Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MIDWEST MOTOR EXPRESS, INC.,
MME, INC., MIDNITE EXPRESS, INC.
and EXPRESS CARTAGE, INC.,
Petitioners,

v.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eighth Circuit's judgment in this case presents fundamental issues of jurisdiction and procedure concerning the collection of withdrawal liability under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1368, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1461.

1. Whether a multiemployer pension plan may file a MPPAA withdrawal liability action before the plan has served notice on the employer, before the debt becomes due, before the employer has an opportunity to cure, and before the employer is in default?

2. Whether the district courts and courts of appeals should determine where subject matter jurisdiction first attached, by looking beyond the jurisdictional allegation in the complaint to the jurisdictional facts contained in the complaint before they apply the first-filed rule?

PARTIES TO THE PROCEEDING

Petitioners, who are part of the control group that would be liable for any withdrawal liability under MPPAA are:

1. Midwest Motor Express, Inc.
2. MME, Inc.
3. Midnite Express, Inc.
4. Express Cartage, Inc.

Pursuant to Supreme Court Rule 29.6, petitioners declare that MME, Inc., a privately held company, is the parent company of the other above-named petitioners.

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PETITION FOR WRIT OF CERTIORARI

Midwest Motor Express, Inc., MME, Inc., Midnite Express, Inc., and Express Cartage, Inc. ("Midwest") petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-7a) is reported at 70 F.3d 1014. Neither the opinion of the district court (App. 8a-10a) nor of the magistrate judge (App., 11a-15a) was published.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1996, as corrected December 21, 1996. App., 1a-7a. The timely petition for rehearing was denied on December 22, 1996. *Id.* at 16a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1948).

STATUTES INVOLVED

1. The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1368 (1974), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1461 (1980), provides in pertinent part:

> **§ 1382. Determination and collection of liability; notification of employer.** When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part [29 U.S.C. §§ 1381 et seq.], shall—
>
> (1) determine the amount of the employer's withdrawal liability,
>
> (2) notify the employer of the amount of the withdrawal liability, and
>
> (3) collect the amount of the withdrawal liability from the employer.
>
> * * * *
>
> **§ 1399b. Notification, demand for payment, and review upon complete or partial withdrawal by employer**. (1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—
>
> (A) Notify the employer of—
>
> (i) the amount of the liability, and
>
> (ii) the schedule for liability payments, and

(B) Demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in Paragraph (1), the employer—

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of—

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc. (1)(A)

(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 4211 [29 U.S.C. § 1391], adjusted if appropriate first under section 4209 [29 U.S.C. § 1389] and then under section 4206 [29 U.S.C. § 1386] over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the

> plan year following the plan year in which the withdrawal occurs and as if each subsubsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

* * * *

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

* * * *

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means—

> (A) The failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure. . .

* * * *

§ 1401 Resolution of Disputes.

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc. (1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 [29 U.S.C. § 1381-1399] shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) The date of notification to the employer under section 4219(b)(2)(B) [29 U.S.C. § 1399(b)(2)(B)], or

(B) 120 days after the date of the employer's request under section 4219(2)(A) [29 U.S.C. § 1399(b)(2)(A)].

The parties may jointly initiate arbitration within the 180-day period after the date of plan sponsor's demand under section 4219 (b)(1) [29 U.S.C. § 1399(b)(1)].

* * * *

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings. (1) If no arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsor under section 4219(b)(1) [29 U.S.C. § 1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 4301 [29 U.S.C. § 1451] to enforce, vacate, or modify the arbitrator's award.

* * * *

§ 1451. Civil actions.

(a) Persons entitled to maintain actions. (1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle [29 U.S.C. §§ 1381 *et seq.*] with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective

bargaining, may bring an action for appropriate legal or equitable relief or both.

* * * *

(b) Failure of Employer to Make Withdrawal Liability Payment within Prescribed Time. In any action under this Section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 515 [29 U.S.C. § 1145]).

* * * *

(f) Time Limitations. An action under this section may not be brought after the later of—

(1) Six years after the date on which the cause of action arose. . .

2. The federal change of venue statute, 28 U.S.C. § 1404 (1948) states:

§ 1404. Change of Venue.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought

INTRODUCTION AND STATEMENT OF THE CASE

This case presents both a critical threshold question defining when a cause of action accrues under MPPAA, and an important and frequently recurring issue in cases where the first-filed rule is invoked to transfer venue under 28 U.S.C. § 1404.

This case provides an ideal vehicle for this Court to resolve these questions because it is undisputed that Central States Southeast and Southwest Areas Pension Fund ("Central States") filed its Action (hereinafter referred

to as "Collection Action") (App., 18a-22a) prematurely. Accordingly, the decision below turns entirely on the following legal question: whether a litigant may establish jurisdiction in the forum of its choice by filing a premature action in violation of the statutory procedures of MPPAA and the first-filed rule.

The split of authority centers on precisely the issue presented in this case, *viz.*, whether a district or appellate court must make a threshold examination of jurisdiction. Eight courts of appeals have addressed this question, reaching incompatible results. Unless the first-filed rule is uniformly applied, litigants will obtain disparate treatment merely because of their choice of forum. Review by this Court is, therefore, needed to restore nationwide uniformity on a question of great practical consequence to litigants and the courts and to maintain just decisions on the merits.

STATEMENT OF THE FACTS

This case concerns an attempted collection of withdrawal liability by Central States against Midwest, under ERISA, as amended by MPPAA.

Founded in 1938, Midwest is a privately owned corporation duly organized and existing under the laws of the State of North Dakota. Its principal place of business is in Bismarck, North Dakota. Between November 1, 1939 and April 1, 1991, Midwest engaged in multiemployer bargaining with the International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America ("Teamsters" or "Union") and during much of that period was bound by the terms of a series of collective bargaining agreements.[1]

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[1] Between 1964 and March 31, 1991, Midwest was bound by the provisions of the National Master Freight Agreement and Central States Area Local Cartage Supplemental Agreement and the National Master Freight Agreement and Central States Area Over-The-Road Motor Freight Supplement, which were multiemployer collective bargaining agreements between Midwest and the Teamsters.

Under those collective-bargaining agreements, Midwest made pension contributions to Central States from February 1, 1955 to August 12, 1991. Midwest's last collective bargaining agreement expired on March 31, 1991. For the first time since the 1930's, Midwest engaged in single-employer bargaining.[2] When those negotiations reached impasse, the Union struck Midwest on August 12, 1991. At that time, Midwest ceased making its pension contributions to Central States, in accordance with Article III, Section 1, "Amount of Contribution," of Midwest's 1991 Trust Agreement with Central States.[3]

Nevertheless, on December 10, 1991, Central States mailed Midwest a Notice and Demand for Withdrawal Liability after Midwest legally had suspended its contributions to Central States during the strike. On March 5, 1992 Midwest informed Central States that there had been no permanent cessation of Midwest's obligation to contribute under the plan. Central States' refused to accept Midwest's explanation that there had been no permanent cessation of its obligation to contribute. Midwest then was forced to seek declaratory and injunctive relief in federal court. In May 1992, Central States rescinded its withdrawal liability assessment against Midwest. Based on Central States' action, Midwest agreed to dismiss the action without prejudice. Midwest and the Teamsters continued collective bargaining.

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[2] Midwest entered single-employer bargaining because it could no longer afford the wage costs, fringe benefit costs, and the work rule restrictions contained in previous multiemployer agreements and, at the same time, remain competitive in its regional market. Efforts to negotiate a new collective bargaining agreement started on May 31, 1991, and continued on various dates thereafter.

[3] Under this section of the Central States Trust Agreement, Midwest was not required to make contributions during a strike following contract termination, unless the parties agreed otherwise, and, thus, the cessation of contributions was expected to be temporary. Midwest also was permitted by law to suspend contributions to Central States during its labor dispute. *See* 29 U.S.C. § 1398(2) (1980).

On January 13, 1994, a Midwest employee in Fargo, North Dakota, filed a petition with the National Labor Relations Board ("NLRB") to request an election to decertify the Union as the bargaining agent for Midwest. On April 1, 1994, Midwest's employees voted to decertify the Union. On April 15, 1994, the NLRB certified the election results. Midwest took no action to initiate or to affect the decertification process that ended the labor dispute. Furthermore, Midwest conducted no campaigning activity.

On April 26, 1994, Central States filed, but did not serve, its Collection Action against Midwest in the Northern District of Illinois. That action sought to collect withdrawal liability even though Central States had not yet served Midwest with its Notice and Demand of Withdrawal Liability (App., 23a-25a) and, as of that date, no withdrawal liability was due and owing under MPPAA. Midwest did not receive that Notice and Demand of Withdrawal Liability, dated April 26, 1994, until April 27, 1994. At that time, Midwest was still unaware that Central States had filed the premature Collection Action in Illinois.

On May 4, 1994, in timely response to Central States' notice, Midwest filed suit in the United States District Court for the District of North Dakota. It again sought declaratory and injunctive relief and raised constitutional issues.[4] That suit ultimately led to the appeal in the Eighth Circuit which is the subject of this petition. App. 1a-7a. The Complaint was served on Central States on

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[4] Midwest challenged the constitutionality of MPPAA on the grounds recognized by Justices O'Connor and Powell in their concurrence in *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 228-236 (1986) (O'Connor, J., concurring) and by Justice O'Connor in *Concrete Pipe and Products of California, Inc. v. Construction Laborers' Pension Trust for Southern California*, 508 U.S. 602 (1993) (O'Connor, J., concurring).

May 6, 1994. Three days later, on May 9, 1994, Midwest received a Notice of Lawsuit and Request for Waiver of Service of Summons, together with a copy of the Complaint in Central States' prematurely-filed Collection Action.

Proceedings in the District Court

Midwest sought to dismiss Central States' premature Collection Action or, in the alternative, to have it transferred to the District of North Dakota. Central States filed a motion in the North Dakota District Court to transfer venue to the Northern District of Illinois in an effort to force Midwest to litigate its claims in Central States' carefully chosen forum. Despite Midwest's contention that Central States' Collection Action was premature, the magistrate judge in North Dakota granted Central States' transfer motion, on the basis that the Collection Action "was filed first." App., 14a.[5]

On August 2, 1994, Midwest appealed that order to the Honorable Patrick A. Conmy, once again pointing out the jurisdictional problem created by Central States' violation of MPPAA's collection procedures. Nevertheless, Judge Conmy upheld the judge's decision and granted Central States' motion to transfer venue, holding that:

> At this stage the Illinois action is the 'first filed' action. The North Dakota case is not meaningfully 'further along' and the two cases involve the same issues. Moreover, the Court is reasonably certain that the Illinois court is more familiar with the 'angles' and 'ins and outs' of Employee Pension Fund Law.

App., 10a.

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[5] The Magistrate Judge also dismissed all pending motions without prejudice, including Midwest's Motion for a Preliminary Injunction.

Proceedings in the Court of Appeals

Midwest filed its Notice of Appeal to the Eighth Circuit, pursuant to 28 U.S.C. § 1292(a)(1) because the District Court denied a request for an injunction. The court issued its decision affirming the order of the North Dakota District Court on December 4, 1994. The opinion held that Midwest's request for a threshold examination of the jurisdictional facts in the Collection Action was a request for a determination on the merits, rather than an examination of jurisdiction and, therefore, Central States' Collection Action was the first filed. App., 5a. Essentially, the Eighth Circuit accepted Central States' allegation of jurisdiction on its face despite Midwest's jurisdictional challenge. *Id.*

Midwest timely filed its Petition For Rehearing With Suggestion For Rehearing En Banc. The Eighth Circuit denied both requests. App., 16a. Midwest, filed a motion to stay the mandate of the Eighth Circuit, which was granted. App., 17a.

REASONS FOR GRANTING THE PETITION

The judgment below conflicts with decisions of four other courts of appeals and the district courts in another circuit on an important, recurring question of special practical importance to litigants under MPPAA. Specifically, it allows a pension plan to file a collection claim for withdrawal liability against an employer before it has given the employer the requisite statutory notice and demand and before any default has occurred from which a cause of action could accrue.

Additionally, the decision below conflicts with decisions of seven courts of appeals because it fails to analyze the jurisdictional fact allegations and permits Central States to establish jurisdiction under the first-filed rule on the strength of nothing more than its conclusory jurisdictional allegation in its complaint.

Guidance from this Court is plainly needed to ensure nationwide uniformity on the important issue whether a plan attempting to initiate a MPPAA collection action may ignore specified statutory procedural requirements that are preconditions to filing suit in order to select the forum of its choice. Moreover, the absence of factual disputes on the critical issues in this case offers an ideal record for this Court's consideration.

I. THE CIRCUIT COURT'S DECISION CONFLICTS WITH THE DETERMINATION BY OTHER CIRCUITS THAT MPPAA'S STATUTORY PROCEDURES AND OTHER REQUIREMENTS MUST BE FOLLOWED IN COLLECTION ACTIONS.

Every circuit that has addressed the issue squarely, except for the Eighth Circuit in this instance, has held that a MPPAA cause of action accrues only after proper notice and demand have been made and after a default in the demanded payment occurs on the 61st day after demand is made. For example, the Second Circuit remanded a case for determination of "whether the conditions precedent to a suit for collection of withdrawal liability have been met." *ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks*, 846 F.2d 879, 887 (2d Cir. 1988).[6]

The Third Circuit held that:

> the cause of action arose from the date upon which the employer failed to make a payment on its withdrawal liability demanded by the plan sponsor. . . . the action that "adversely affected" the plan was the failure to make the scheduled payment, and that therefore the cause of action accrued at that time.

Board of Trustees of District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp., 43 F.3d 852, 860 (3d

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[6] *See also Debreceni v. George Lamoureux & Co.*, 629 F.Supp. 598, 601 (D.Mass. 1986), which appears to be the only First Circuit opinion on point and which held that notice and demand are preconditions to a suit for collection of withdrawal liability.

Cir. 1994), *citing with favor Joyce v. Clyde Sandoz*, 871 F.2d at 1120.

Similarly, the Fourth Circuit has strictly adhered to the statutory collection procedures of MPPAA, stating that:

> 29 U.S.C. § 1399(c)(2) requires that payments be commenced within sixty days after the date of demand by the plan sponsor. 29 U.S.C. § 1399(c)(5)(A) permits the plan sponsor to treat nonpayment as default if it is not cured within sixty days after it notifies the employer of its failure to pay.

Republic Industries v. Teamsters Joint Council, 718 F.2d 628, 641 n.15 (4th Cir. 1983). *Republic* recognizes that the notice and cure periods are part of the statutory scheme designed to provide due process to withdrawing employers. *Id.* *Republic* further recognizes that MPPAA itself is ambiguous about when payments become due and owing, suggesting that no payment is due until arbitration is completed. *Id.* at n.16.

Finally, the Seventh Circuit repeatedly has held that a collection claim does not accrue until notice and demand have been made. In *Robbins v. Pocket Beverage Co., Inc.*, the Seventh Circuit held that a "statutory default" authorized assessment of withdrawal liability "from the due date of the first payment." 779 F.2d 351, 353 (7th Cir. 1985). In *Central States Pension Fund v. Slotky*, Judge Posner found that, "[t]o trigger application of the statute, the pension plan must issue a notice, and a demand for payment, of withdrawal liability to the employer." 965 F.2d 1369, 1371 (7th Cir. 1992). Judge Posner further explained that MPPAA envisions an informal conciliation process to resolve any disputes over assessments before a more formal challenge through arbitration must be made. Only if the employer fails to timely initiate arbitration does "the amount of withdrawal liability assessed by the plan" become "due and owing" and only then can the plan "sue to collect it." *Id.* at 1371-72.

More recently, the Seventh Circuit reaffirmed the statutory procedures in *Central States, S.E. & S.W. Areas Pension Fund v. Bell Transit*, where it held:

> To collect withdrawal liability under the MPPAA, the plan must first 'determine the amount of withdrawal liability owed by a withdrawing employer, 29 U.S.C. §§ 1382, 1391, and send the employer a notice and demand for payment of that amount, 29 U.S.C. § 1399(b)(1)'. *Central States, Southeast and Southwest Areas Pension Fund v. Ditello*, 974 F.2d 887, 888 (7th Cir. 1992).

22 F. 3d 706, 707 (7th Cir. 1994).

The reason why the Eighth Circuit's decision is so seriously out of step with the other circuits is that the court's approach is inconsistent with both the statute and the regulations implementing it, as adopted by the Pension Benefit Guaranty Corporation ("PBGC"). The provisions of MPPAA require a multiemployer pension plan to follow certain statutory procedures *in sequential order*: to determine, to notify, to declare default and, only then, to collect.[7] Instead of following that statutory procedure, Central States created its own procedure: it determined, sued to collect, and then notified the employer.

Central States mailed its Notice and Demand on April 26, 1994. Midwest received it on April 27, 1994. The notice contained a due date of June 1, 1994, for payment of the entire withdrawal liability, and a due date of May 1, 1994, for the first monthly installment payment if Midwest chose to pay by the installment method. Central States then mailed a Past Due Notice

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[7] More specifically, the plan must: (1) determine the amount of the employer's withdrawal liability, 29 U.S.C. §§ 1382, 1391; (2) send the employer a notice and demand for payment, 29 U.S.C. § 1399(b)(1); (3) wait the statutory 60-day period to see whether the employer will pay, 29 U.S.C. § 1399(c)(2); (4) declare a statutory default and wait another 60 days to determine if the failure to pay is cured, 29 U.S.C. § 1399(c)(5)(A); and (5) sue to collect within six years. 29 U.S.C. § 1451(f)(1).

and Demand for Payment of Withdrawal Liability to Midwest on August 4, 1994. Thus, under the most favorable possible view of Central States position, its cause of action did not arise until October 3, 1994, *153 days after Midwest filed* its constitutional challenge in the District of North Dakota.[8]

In addition to the statutory sections cited above, Central States' anitcipatory Collection Action was unauthorized by the enforcement provisions of MPPAA. First, ERISA Section 4301(b) [29 U.S.C. 1451(b)] makes it clear that an action to compel payment is only appropriate if the employer has failed to make withdrawal liability payments within the time prescribed.

Second, the jurisdictional provision of the MPPAA provides, in part:

> A plan fiduciary, employer, plan participant, or beneficiary, *who is adversely affected* by the act or omission of any party under this subtitle [29 U.S.C. §§ 1381 *et seq.*] with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

29 U.S.C. § 1451(a)(1) (emphasis added). Until an employer has failed to make a demanded payment, and failed to cure, withdrawal in itself "does not visit any adverse effect upon the plan that gives rise to [a] cause of action." *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1123 (D.C.Cir. 1989). Until Central States was adversely affected by the act or omission of Midwest under this subtitle, there was no statutory basis upon

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[8] However, Central States' cause of action did not accrue on October 3, 1994, and, indeed, still has not accrued. Because Midwest timely filed for arbitration in this matter, Central States' cause of action will not accrue until the 61st day after issuance of the arbitrator's decision. *See* 29 C.F.R. § 2644.2(c)(1)(iii). Arbitration of this matter has not commenced.

which to lay jurisdiction in Central States' Collection Action. 29 U.S.C. § 1451(a). When Central States filed the Collection Action, the cause had not yet accrued. Thus, the Collection Action was premature and not ripe, and the Illinois district court lacked subject matter jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 199, 201-02 (9th Cir. 1989).

By bringing suit against Midwest before the employer received any notice, Central States: (1) violated and reordered the procedures set out in 29 U.S.C. § 1382; (2) ignored the conciliation provisions of 29 U.S.C. § 1399; (3) displaced the arbitration provisions of 29 U.S.C. § 1401; and (4) violated MPPAA's enforcement provisions, 29 U.S.C. § 1451(a).

This Court should grant certiorari because the decision below is seriously flawed—it is inconsistent with the statute, PBGC regulations and the precedent of other circuits. It condones Central States' intentional violation of the law by allowing its jurisdictionally infirm and premature action to be accorded first-filed status on the basis of MPPAA jurisdiction that did not exist. The decision undermines the sense of fair play necessary for the American system of justice, because it allows blatant forum shopping by MPPAA plaintiffs.

II. THE CIRCUIT COURT'S HOLDING REGARDING THE STANDARD FOR JURISDICTIONAL ANALYSIS CONFLICTS WITH OTHER CIRCUITS AND DOES NOT REPRESENT SOUND PUBLIC POLICY

The decision below conflicts with decisions by seven other circuits regarding the appropriate scrutiny to be used during a threshold examination of subject matter jurisdiction. Midwest considers this jurisdictional flaw critical in a transfer of venue case where a race to the courthouse invokes the first-filed rule. This issue will have a profound effect in transfer situations where there might be concurrent jurisdiction in two federal courts, since the first-filed rule determines the proper venue according

to which party first establishes jurisdiction. This Court should resolve this split of authority and establish uniform nationwide application of the first-filed rule to venue transfer motions.

The first-filed rule, one of judicial construction under 28 U.S.C. § 1404(a), generally provides that when two federal district courts have concurrent jurisdiction, it is in the interest of justice to permit the court that first acquired jurisdiction to hear the case. Thus, the second action is transferred to the court where the first action is pending.

Of critical importance to invocation of the rule, however, is the assumption that both federal courts properly have jurisdiction over the causes pleaded. The rule is in actuality, a "first-to-obtain-jurisdiction" rule. Jurisdiction is, of course, always of primary importance to federal courts. Rule 12(b)(1), the vehicle by which subject-matter jurisdiction is challenged, provides, in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading therto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter. . .

Fed. R. Civ. P. 12(b)(1).

Rule 12(b)(1) contemplates two types of challenges to jurisdiction. The first type of challenge, a facial attack, merely questions the sufficiency of the subject matter jurisdiction alleged in the complaint. *Fed. R. Civ. P.* 8(a)(1). The second type of challenge, a factual attack, asserts that the federal court actually lacks jurisdiction over the subject matter of this case, regardless of the sufficiency of the allegations in the complaint. *KVOS, Inc. v. Associated Press*, 299 U.S. 269 (1936). *See* generally 5A Wright & Miller, *Federal Practice and*

Procedure: Civil 2d § 1350 at 211-13 (2d Ed. 1990 and 1995 Supp.).

When deciding a factual attack under Rule 12(b)(1), several circuits have held that federal courts should look beyond the jurisdictional allegations in the complaint, even if this requires receiving evidence, and resolve any disputed jurisdictional facts to determine whether in fact subject matter jurisdiction exists. *See, e.g., Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995); *Moran v. Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994); *Ohio National Life Ins. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990); *Rennie v. Garrett*, 896 F.2d 1057, 1057-58 (7th Cir. 1990); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *Mortenson v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 890-92 (3d Cir. 1977); and *Exchange Nat'l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1131 (2d Cir. 1976).[9] In Central States' Collection Action, however, the presentation and receipt of evidence would not have been necessary, because the factual allegations contained in the complaint, and the provisions of MPPAA, were sufficient to allow the court to determine that jurisdiction did not exist.

The circuit court's decision, however, conflicts with this long line of decisions because it accepted jurisdiction based on nothing more than Central States' jurisdictional allegation in the complaint filed in the Collection Action. When facts presented to the court give rise to a factual challenge to the basis of jurisdiction, the court *must* weigh the conflicting evidence to determine whether jurisdiction exists or not.[10] *Ohio National Life Ins. Co.*,

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[9] Other decisions by the Second and Third Circuits are not inconsistent with the Eighth Circuit's decision. *See Goldman v. Gallant Sec., Inc.*, 878 F.2d 71 (2nd Cir. 1989); *Kulick v. Pocono Downs Racing Ass'n, Inc.*, 816 F.2d 895 (3rd Cir. 1987); and *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277 (3rd Cir. 1993).

[10] It appears that the decision below is also in conflict with earlier Eighth Circuit decisions that seem to require an examination of

922 F.2d at 325. In addition the court has wide discretion to allow affidavits, documents or other evidence in an evidentiary hearing to resolve the disputed jurisdictional facts. *Id.* The subject matter jurisdiction of the federal courts presents a question of law, which is reviewable *de novo*. *McCarthy*, 850 F.2d at 560.[11]

Judicial economy demands that the issue of jurisdiction be decided early. For this reason and because federal courts are courts of limited jurisdiction, federal courts generally treat the question of jurisdiction as the primary initial question in a case. The Third Circuit expressed the standard succinctly:

> Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Mortenson, 549 F.2d at 891.

Consistent with the majority rule and the law in the Eighth Circuit prior to the decision under review, Midwest asked the court to determine, as a threshold matter,

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jurisdictional claims in parallel cases under the first-filed rule, even if it entails a review of evidence beyond the facts alleged in the complaint. *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993). *Osborn v. United States*, 918 F.2d 724, 729-30 (8th Cir. 1990). *Boatmen's First National Bank of Kansas City v. Kansas Public Employees Retirement System*, 57 F.3d 638 (8th Cir. 1995) (the district court must consider the factual circumstances in each case before applying [the first-filed] rule). 57 F.3d at 641. Certainly, future litigants will be confused about this apparent conflict.

[11] Where no factual dispute exists, the appellant court may also evaluate the merits of jurisdictional claims *de novo*. *Mortenson*, 549 F.2d at 891.

whether Central States filed suit in Illinois before it complied with the statutory prerequisites from which federal jurisdiction arises. The court could have determined from the face of Central States' complaint, and the provisions of MPPAA, that the pension fund failed to comply with the statutory prerequisites to a collection action. *See* Argument I, *supra*. However, the court below refused to make a threshold determination to resolve Midwest's factual attack on the jurisdiction of the Collection Action.

This Court should grant certiorari in order to address the problem, increasingly common in MPPAA cases, of uninhibited forum shopping based on nothing more than conclusory pleadings. This case represents a grave departure from the accepted and usual course of determining jurisdictional issues.

III. FURTHER ATTRIBUTES OF THIS CASE FAVOR GRANTING CERTIORARI.

For several reasons, the procedural posture of this case makes it ideal for this Court's review. First, the questions presented are devoid of any factual dispute. For example, it is undisputed that Central States filed its action before it had served notice on Midwest of its assessed liability, and before payment was due. Second, the judgment below turns entirely on the legal standard employed by the Eighth Circuit.

IV. PRACTICAL CONSEQUENCES FAVOR GRANTING CERTIORARI.

This Court's review is also warranted because the existing split in the circuits has disruptive economic and jurisprudential ramifications and will encourage forum shopping. Under the rule adopted by the Eighth Circuit, the jurisdiction of the transferee court is not made until after a Section 1404 transfer has been completed. By that time, the parties will already have expended significant time and resources on the transfer issue, and will be

forced to duplicate those efforts in the transferee court. If jurisdiction is found wanting by the transferee court, valuable time and judicial resources will have been wasted.

The problem is particularly acute for pension funds and employers who do not have the financial wherewithal to pay for duplicative litigation that inevitably results from the transfer of an action to a court that lacks subject-matter jurisdiction. Even if the impact of the decision below were limited to the thousands of employers headquartered in cities like St. Louis, Kansas City, Minneapolis-St. Paul, Little Rock, Omaha, and Des Moines (all within the Eighth Circuit), the case would still have sufficient importance to merit this Court's review. Unless this Court establishes uniformity, valuable time, money and court resources will continue to be wasted.

The decision below will expose defendants to the burden and expense of proceedings in a second forum, when a transfer may have been denied upon a proper examination of jurisdiction in both the transferor and transferee courts. Had this instant case been brought against Midwest in the Second, Third, Fourth, Fifth, Sixth, Seventh or Ninth circuits, for example, the complaint would have been dismissed. Such disparity in results makes the uniform administration of federal law among the circuits impossible.

CONCLUSION

The petition for writ of certiorari should be granted to establish when a cause of action accrues under MPPAA and to establish a uniform methodology for application of the first-filed rule in transfer motions.

Respectfully submitted,

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